IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

NOTICE OF MOTION NO.3872 OF 2007
IN
SUIT NO.2876 OF 2007

Fairview Co-operative Housing
Society Ltd. ...Plaintiff.

Versus

Savinder S. Rekhi & Ors. ...Defendants.

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Dr.Virendra Tulzapurkar, Senior Advocate with Mr. Kevik Sethalwad i/b. M/s. D.H. Law Associates for the Plaintiff.
Mr.F. Devitre, Senior Advocate with Mr.Snehal Shah i/b. M/s. Purnanand & Co. & S.B. Kotak & Co. for Defendant Nos.1 and 2.
Mr. D.H. Mehta with Mr. H.C. Pimple and Mr. R.Y. Sirsikar for Defendant No.6.
Mr. S.U. Kamdar with Ms.Deepa Pohuja for Defendant No.8.

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CORAM : DR. D.Y. CHANDRACHUD, J.

December 19, 2007.

JUDGMENT :

The relief which has been sought by the Plaintiff in the Notice of Motion which falls for consideration is to the following effect:

-(i) Injunctive relief is sought against the Defendants from loading or utilizing TDR on the plot of land forming the subject matter

of the suit;

(ii) Injunctive relief is sought against Defendant Nos.1 to 5 and 8 from carrying out development or construction on the plot in question;

(iii) Injunctive relief is sought restraining Defendant Nos.1 to 5 and 8 from entering into transactions for the sale of premises in the proposed building which is to be constructed on the plot;

(iv) Implementation of the sanction and permission granted by the Municipal Corporation for development is impugned; and

(v) The appointment of a Receiver is sought in respect of the work of construction that is being carried out by Defendant Nos.1 to 5 and 8. Arguments have been heard on the Notice of Motion and with the consent of all the Learned Counsel, the Motion has been taken up for hearing and final disposal.

2. The plot of land to which the proceedings relate, comprises of CTS 1613 at Chembur and admeasures 2787 sq.mtrs. The land was allotted to Preeti Sahu when a Town Planning Scheme was prepared in 1942-43 by the Additional Collector. Two buildings were constructed on the plot. The first which is described as Building No.1 was a bungalow. The second being Building No.2 consisted of a structure with a ground floor and three upper floors. The Plaintiff is a Co-operative Housing Society which was registered on 29th May 1964. On 24th June 1964, a Deed of Conveyance was executed between the owner and the Plaintiff by which the owner transferred and assigned the plot to the Plaintiff. Contemporaneously, a Deed of Covenant also dated 24th June 1964 was entered into between the Plaintiff and the owner. The covenant provided that the Society had enrolled the Vendor as its member; the Vendor as a member of the Society would have a permanent right of residence in Building No.1 and to let out the aforesaid building and to assign her right of membership. Clause (1-g) of the Covenant provided as follows :

> "(g) The Society shall also give the necessary permission to the Vendor and/or her assigns, whenever requested to construct at their own cost an additional floor or floors on the said Building No.1 in accordance with law

> the Municipal Rules and Building Bye-Laws and if required the Society shall carry out such additional construction at the cost of the Vendor and/or her assigns through the Architect and contractors to be approved or by the vendor and/or her assigns."

Under clause (i), the Vendor was entitled to demolish and reconstruct Building No.1 and the Society undertook to give permission to the Vendor:

> "(i) The Vendor and her assigns as such members of the Society shall have the right to renovate at their own cost the said Building No.1 and at like cost, to demolish and/or re-construct the Building No.1 and the Society doth hereby agree and undertake to give to the Vendor and/or her assigns the requisite permission for the said purpose and the Society shall, if required,carry out the said work at the cost of the Vendor and/or her assigns through the Architect and Contractors approved of by the Vendor and/or her assigns."

Under clauses (l) and (m), the Covenant provided as follows :

> "(l) Under the present Rules of the Bombay Municipal Corporation regarding building construction in Chembur the Vendor is entitled to additional floor area of about 2500 square feet in respect of Building No.1 and the Vendor shall be entitled to utilize the same. If at any time hereafter the Floor Space Index (FSI) in respect of the said piece or parcel of land more particularly described in the Schedule hereunder written is increased the same shall enure to the benefit of the vendor to the intent and effect

that the vendor shall be entitled to construct additional floor on Building No.1 to the extent permitted by the increase in FSI and the Society shall not make any alteration and/or addition to the Building No.2 in any manner that may affect the said right of the Vendor.

(m) Whenever required by the Vendor the Society shall make an application for the sub-division of the said piece or parcel of land more particularly described in the Schedule hereunder written as indicated by the dotted line on the said plan and in the event of such sub-division being approved and/or sanctioned by the Bombay Municipal Corporation it shall be at the option of the Vendor to have the said piece or parcel of land sub-divided and to take a Conveyance from the Society in respect of Building No.1, and the land appertaining thereto and the land enclosed by the said dotted lines falling on the side of Building No.1 by payment of the society of a nominal consideration of Re1/- and the Society shall execute such conveyance in favour of the Vendor and/or her assigns or the person or persons nominated by them and the Society shall bear all the out of pocket costs charges expenses in respect of such conveyance."

The Deed of Conveyance as well as the Covenant were registered. The FSI consumed in the bungalow (Building No.1) was 5900 sq.ft., while FSI consumed in the second building was 24,500 sq.ft.

3. On 22nd April 1975, a tripartite agreement was entered into between the Plaintiff, Preeti Sahu and Defendant Nos. 1 to 5. The

agreement provided that Preeti Sahu as transferor and Defendant Nos.1 to 5 as transferees had agreed that the transferees should get vacant possession of the bungalow and that the membership of transferor in respect of the bungalow be transferred to them. Clause 3 entitled Defendant Nos. 1 to 5 to obtain a sub division of the plot so as to bifurcate the portion of the plot on which the bungalow was constructed from the plot on which the multi storeyed building of the Society was constructed. Upon the sub division, the Society was to have no right, title or interest in the portion of the plot on which the bungalow stands. On 30th April 1975, a Deed of Assignment was executed by Preeti Sahu in favour of Defendant Nos.1 to 5. By and as a result of the assignment, Defendant Nos.1 to 5 became entitled to all the benefits conferred by the Deed of Conveyance dated 24th June 1964.

4. Initially by a letter dated 13th January 1990, the First Defendant recorded that he was entitled to get the property sub-divided so as to bifurcate the plot with the bungalow from the land on which the Society's building was constructed. The First Defendant

stated that it appeared that the plot had been lawfully sub-divided. As a matter of fact, it has not been disputed before this Court during the hearing of the motion that there is no sub division of the plot. Defendant Nos. 1 to 5 had instituted certain proceedings before the Co-operative Court seeking a conveyance in respect of the plot of land together with the bungalow, but the dispute was withdrawn. On 2nd December 1993, the First Defendant sought the consent of the Plaintiff for the redevelopment of the property subject to the condition that the Defendants intended to do so to the extent of the existing constructed area. At a meeting of the General Body, the Plaintiff agreed to consider the proposal subject to the withdrawal of the Co-operative case by Defendant Nos. 1 to 5 and it would appear that the withdrawal of the co-operative dispute was in pursuance of the condition imposed by the Co-operative Society. This was made clear in the letter dated 13th April 1994 of Defendant Nos. 1 to 5. The existing bungalow was thereupon demolished and two bungalows came to be constructed.

5. On 20th January 2000, the First Defendant addressed a

letter to the Plaintiff seeking the permission of the Plaintiff for the construction of a multi storeyed building in the area which was lying vacant between the two bungalows. At a Meeting of the Special General Body of the Plaintiff held on 19th March 2000, the members of the society agreed to grant permission for development subject to the condition that the development should be in accordance with the Development Control Rules and should not jeopardise the rights of the Society. The relevant part of the resolution reads as follows:

> "After some discussion, it was decided to grant necessary permission to Rekhi for development subject to conditions which will safeguard our interest. It will be made clear to Rekhi that the development will be strictly in accordance with Development Control Rules of Municipal Corporation and will in no way jeopardise the rights of the Society and that liabilities arising out of the development will be borne by Rekhi and the Society shall be indemnified by M/s.Rekhis."

On 25th March 2000, the Plaintiff granted its provisional approval subject to compliance of the Development Control Rules and submission of the Plan of the proposed building for the approval of the Society. On 4th July 2000, the Plaintiff informed the First Defendant that the Managing Committee of the Society had not accepted the

proposal for the utilization of TDR as a result of which, the plans could not be approved. There was thereupon an exchange of correspondence. On 8th June 2006, the Municipal Corporation informed the Plaintiff that the proposal for development submitted by Defendant Nos. 1 to 5 was being processed under the Development Control Regulations of 1991 for utilizing the permissible TDR on the entire plot, based on the resolution passed by the General Body on 19th March 2000 and the NOC of 25th March 2000. The Architect of Defendant Nos. 1 to 5 submitted plans for loading TDR and submitted a Development Rights Certificate for 2080 sq.mtrs. The Municipal Corporation has permitted utilization of TDR to the extent of 80% of the net plot area or 2180 sq.mtrs.

6. The decision of the Municipal Corporation to allow the utilization of TDR has been impugned on behalf of the Plaintiff. At the hearing of the Notice of Motion, it has been urged on behalf of the Plaintiff that (i) Defendant Nos. 1 to 5 are not entitled to utilize TDR while carrying out construction on the plot of land and the Development Control Regulations of 1991 stipulate that the benefit of

TDR is to be given to the owner of the land; (ii) There has been no sub-division of the land and even if the land were to be subdivided Defendant Nos. 1 to 5 would be entitled only to the benefit *pro rata* of the TDR available for the bifurcated plot; (iii) Until a sub-division takes place, the Plaintiff is the owner of the land and would be entitled to TDR; (iv) The utilization of TDR by Defendant Nos. 1 to 5 can only be permitted when the TDR is generated from this plot only; and (v) In the alternative Defendant Nos. 1 to 5 would not be entitled to TDR available on the Plaintiff-Society's plot.

7. On the other hand, on behalf of the Defendants, it has been urged that the Plaintiff is bound by the terms of the Covenant dated 24th June 1964 under which the predecessor in interest of Defendant Nos. 1 to 5 was entitled to demolish or reconstruct the existing bungalow and to utilize any additional FSI that became available on the plot of land more particularly described in the schedule thereto. TDR, it was urged, is statutorily recognised as a form of FSI under the Maharashtra Regional and Town Planning Act, 1966 and the Development Control Regulations of 1991. While Defendant Nos. 1

to 5 were entitled under the Covenant to the benefit of a sub-division, the covenant did not provide that the right to utilize FSI would be restricted to the subdivided plot. Clause 3 of the tripartite agreement dated 22nd April 1975 would continue to survive and did not obliterate the rights which enured under the Covenant.

8. In considering the merits of the rival submissions for the purposes of deciding the application for interim relief, it would be necessary conceptually to revisit the meaning of TDR. TDR is an acronym for Transferable Development Rights. Section 2(9A) of the Maharashtra Regional and Town Planning Act, 1966 defines the expression "development right" as follows:

> "(9A) "development right" means right to carry out development or to develop the land or building or both and shall include the transferable development right in the form of right to utilise the Floor Space Index of land utilisable either on the remainder of the land partially reserved for a public purpose or elsewhere, as the final Development Control Regulations in this behalf provide." (emphasis supplied)

The expression "Floor Space Index" is defined by Development Control Regulation 2(42) to mean the quotient of the ratio of the

combined gross floor area of all floors to the total plot area. The definition of the expression "development right" therefore, includes transferable development rights in the form of the right to utilize the floor space index of land. This floor space index in the form of TDR is utilizable either on the remainder of the land partially reserved for public purposes or elsewhere as may be provided in the Development Control Regulations. The definitions contained in an Act passed by the legislature, it is trite law, provide a statutory dictionary. TDR is a form of FSI. The Development Control Regulations for Greater Bombay of 1991 elucidate the concept of Transferable Development Rights in Regulation 34. DCR 34 provides as follows :

> "34. Transfer of Development Rights.
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> In certain circumstances, the development potential of a plot of land may be separated from the land itself and may be made available to the owner of the land in the form of Transferable Development Rights (TDR). These Rights may be made available and be subject to the Regulations in Appendix VII hereto."

Appendix VII provides regulations for the grant of transferable development rights to owners/developers and the conditions for the grant of such rights. Under clause (1), the owner or lessee of a plot of

land which is reserved for a public purpose in the Development Plan is eligible for the award of transferable development rights in the form of FSI to the extent and on the conditions set out in the appendix. Such an award entitles the owner of the land to FSI in the form of a development rights certificate which the owner may use himself or transfer to any other person. The FSI of the receiving plot is allowed to be exceeded to the extent permissible under the regulation by the use of TDR. Appendix VIIB provides regulations for the grant of TDR in respect of Slum Rehabilitation Schemes to which it may not be necessary to refer for the purposes of this case. The judgment of a Division Bench of this Court in **Janhit Manch vs. State of Maharashtra** (Writ Petition 637 of 2003, decided on 20th November 2006) makes it abundantly clear that the form in which TDR is to be used is immaterial and the effect of the concept of TDR is to permit the use of additional FSI. The Division Bench observed thus:

> "We may only point out that what form of TDR is to be used is immaterial. The suburbs have a FSI CAP OF 1.00. The additional FSI of 1.00 can only be from heritage TDR, Road TDR, RG TDR and Slum TDR. The form or colour of TDR does not matter. What is relevant is the grant/use of additional FSI by way of TDR."

Conceptually, as a matter of first principle, transferable development rights constitute a legislative recognition of the principle by which the development potential of the land is separated from the land and is made available in the form of a development rights certificate. The genesis of TDR is that lands which were reserved for public purposes including recreation grounds and roads were found to have been encroached upon. The doctrine of TDR was introduced as a matter of legislative policy in order to ensure that upon the public amenities being developed, TDR would be provided in the form of a development rights certificate. This TDR could be utilized in the manner and to be extent contemplated in the Development Control Regulations.

9. In the present case, Preeti Sahu conveyed the land which is more particularly described in Exhibit A to the Plaint to the Plaintiff by a registered Deed of Conveyance. Simultaneously, a Covenant was executed between the parties on 24th June 1964. Under the Covenant which has also been registered, Preeti Sahu reserved the right to complete the construction of Building No.1, namely, the

bungalow. Sahu was entitled under clause (1-g) to construct additional floors and under clause (i) to demolish or reconstruct. Clause (l) specifically provides that under the then prevailing Rules of the Municipal Corporation, Sahu was entitled to additional FSI of 2500 sq.ft. in respect of Building No.1. Parties stipulated that if and any time thereafter, the FSI "in respect of the said piece or parcel of land, more particularly described in the schedule" was increased, the same shall enure to the benefit of the Vendor, namely, Preeti Sahu. The schedule refers to the entire plot of land, namely Plot No.295 admeasuring 3522 sq.yds. Under clause (m) the Vendor was entitled to obtain a sub-division and to take a conveyance from the Society. At this stage, it would be material to note that clause (l) entitled the Vendor to the benefit of any future increases of the FSI in respect of the piece of land more particularly described in the Schedule to the Covenant. Preeti Sahu was, therefore, entitled to the benefit of any additional FSI that may be available in respect of the entire land that forms the subject matter of the Covenant. There is a basic fallacy in the submissions urged on behalf of the Plaintiff. Clause (m) of the Covenant provides that the Vendor – Preeti Sahu – was entitled to

obtain a sub-division. Clause (m), however, does not provide that right to use FSI would be restricted to the sub-divided plot. Similarly, clause (3) of the tripartite agreement that was entered into between the Plaintiff, Preeti Sahu, and Defendant Nos. 1 to 5 did not bring the right under the Covenant to an end. The Plaintiff entered into the Covenant dated 24th June 1964 conscious of the fact that it was conferring upon Preeti Sahu, the Vendor, the entitlement to the balance FSI and to the benefit of any further increase in FSI. Having agreed to do so by a solemn obligation assumed under the Covenant, the Plaintiff cannot complain about the utilization of TDR by Defendant Nos. 1 to 5. The benefit of the Covenant enured to Defendant Nos. 1 to 5 as successors in interest of Preeti Sahu. The rights of the Plaintiff as the owner of the land are subject to the obligations imposed by the Covenant dated 24th June 1964. Consequently, utilization of TDR which is but a method by which additional construction is permitted on the receiving plot cannot be interdicted by the Plaintiff.

10. In these circumstances, the challenge that has been

preferred by the Plaintiff is prima facie lacking in substance. There can be no dispute prima facie that the Plaintiff is the owner of the plot of land. However, the Plaintiff as the owner is bound by the stipulation contained in the Deed of Covenant under which the entitlement of the Vendor to utilize any increase in FSI was reserved. Defendant Nos. 1 to 5 as successors in interest of the Vendors are entitled to the benefit of the stipulations contained in the Covenant. The Plaintiff has, therefore, failed to make out a prima facie case for the grant of interim relief.

11. The Notice of Motion shall accordingly stand dismissed.

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